NO. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

STATEMENT OF PLEADINGS AND JURISDICTION

The Complaint was filed on May 2, 1957, in the Circuit Court of the State of Oregon for the County of Multnomah (R., pp 3, 6). A petition for removal was filed in the United States District Court for the District of Oregon on May 17, 1957, on the basis that said controversy was between citizens of different states and exceeded the sum of $3,000.00, thus giving said court jurisdiction (Title 28, U. S. C. A., †1332,

and Title 28, U. S. C. A., †1441). On May 17, 1957, an answer was tendered and filed by appellee (R., pp 21, 25). The judgement was filed on April 29, 1958 (R., pp 41, 42). Thereafter, a notice of appeal was filed by appellant on May 27, 1958 (R., p 42), and this court has jurisdiction to hear said appeal under 28 U. S. C. A. 1291.

STATEMENT OF THE CASE

Appellee, on the 24th day of December, 1952, issued and delivered to one, Wm. V. Sherer, its certain Comprehensive Public Liability Policy, No. 880-7277 (See appellant's Trial Exhibit No. 3). Sherer was employed as a gasoline and oil distributor by appellant at Bandon, Coos County, Oregon. Said policy provided coverage for bodily injury not to exceed $25,000.00 for each person and $50,000.00 for each occurrence, and appellant by endorsement upon said policy was a named insured so far as its interest was concerned in the operation of Wm. V. Sherer. Attached to the policy was an endorsement entitled, "Exclusion of Product Liability."

On December 1, 1953, Ruth Buffington, who resided near Bandon, Oregon, ordered stove oil through appellant's distributor, Wm. V. Sherer, to be put in a stove oil storage tank, which was attached to the outside of said residence (R., pp 7, 18). Pursuant to the order, a truck drove to the residence on December 2, 1953, and before any stove oil had been placed in the storage tank, Ruth Buffington requested the driver to fill a small can which she kept on the back porch, and stove oil from which she used in order to facilitate the starting of fires in the kitchen stove. The truck was divided into compartments, one of which contained

stove oil, one of which contained regular gasoline, and one of which contained ethyl gasoline. One hose served all three compartments. The driver took this hose and filled the small can. Immediately prior to this, the driver had used the hose to deliver gasoline (R., p 12). Ruth Buffington took the small can on the morning of December 3, 1953, and in using the contents of the same to facilitate starting her kitchen stove fire was seriously and severely burned when the can exploded and enveloped her in flames. (R., pp 13, 14).

On September 12, 1955, appellant was served with Summons and Complaint in an action brought by Ruth Buffington (R., p 7, 18). The policy mentioned above, being in full force and effect on this date, appellant tendered the defense of the above action to appellee, who by letter denied liability under the policy and refused to defend the same on behalf of appellant or any of the other defendants named, including Wm. V. Sherer (R., pp 19, 20). The appellant, through its excess coverage insurer, Continental Casualty Company, thereupon undertook to defend the action and prior to trial compromised and settled the same for the sum of $15,000.00, and in doing so further expended $750.00 attorneys fees, and $260.73 in costs (R., pp 39, 40).

Appellant then brought an action against appellee for refusal to accept liability and for refusal to defend (R., pp 3, 6). At the trial it was stipulated that more than six months had elapsed since the tender of the defense as mentioned above, and the court, in the event of a decision favoring appellant, could set reasonable attorneys fees on

the two causes of action in appellant's Complaint. It was the opinion of the court that although the $15,000.00 paid in settlement of the Buffington action was reasonable as were the expenditures for costs and attorneys fees, there was no coverage afforded appellant under the policy and no obligation of the appellee to defend appellant in said action. The opinion was based upon the rider attached to the policy entitled, "Exclusion of Product Liability" (R., pp 38, 39).

STATEMENT OF POINTS TO BE URGED

The court below erred in that the action brought by Ruth Buffington against appellant was such an action to which appellant was afforded protection under the insuring agreements of the policy of insurance (Appellant's Trial Exhibit No. 3), and appellee breached said insurance contract by:

(1) Failing to accept coverage in view of the negligence alleged in the Buffington Complaint,

AND

(2) Failing to defend appellant in said action in accordance with the terms of said policy.

SUMMARY OF ARGUMENT

The District Court's conclusion that the Ruth Buffington Complaint did not describe an accident and injuries bringing it within the coverage of the policy issued by appellee because of the rider attached and entitled, "Exclusion of Product Liability," and that appellee had no duty to defend appellant and the other insureds, is against the great weight of authority.

The controlling factors in determining whether or not there is coverage afforded appellant under the Comprehensive Public Liability Policy issued by appellee are the matters contained within the allegations of the Ruth Buffington Complaint. If any one of the allegations bring the action within the coverage of the policy or could reasonably be construed to be covered therein then it was the duty of the appellee to defend appellant.

In the event such defense is refused when tendered, the general and prevailing rule is that the insurer is liable not only for the costs of defense and attorneys fees incurred by insured, but the insured may make reasonable settlement or compromise of the action and obtain reimbursement from the insurer.

The negligence alleged in three of the four allegations contained within the first cause of action of the Buffington Complaint (R., pp 11, 13) is directed to the negligent use of the hose upon the truck by the driver, as well as the use of faulty equipment of the appellant. Certainly these allegations of negligence are not directed to a product of the appellant or a defect in a product of the appellant such as might be covered in "Exclusion of Product Liability" endorsement.

It is the apparent and clear intention of Ruth Buffington to claim that appellant's fuel truck with three compartments served with but one hose was faulty equipment when used to dispense both explosive and non-explosive fuel, and it was this negligence which proximately contributed to the accident and injuries suffered by Ruth Buffington. This liability is covered under the general insuring agreements of the policy.

ARGUMENT

Where the provision of a liability policy requires the insurer to defend an action brought against the insured and the insurer refuses to defend in the name of the insured, the insured may proceed to defend the action and hold the insurer liable for such sums as were expended in good faith in compromise and settlement of the action, as well as reasonable costs and attorneys fees involved. The appellee, in view of the negligence alledged in the Buffington Complaint (R., pp 11, 13), had a duty to defend the appellant, and breached its said contract of insurance in failing to do so.

The general rule is that when the requirement to defend is a policy provision, then the duty is determined by the allegations of the complaint filed against the insured.

50 ALR 2d, p 465.
8 Appleman, Insurance Law & Practice, paragraphs 4684-5.

Where a complaint filed against an insured clearly alleges damages resulting from an alleged negligent operation of the insured and a policy of insurance provides that the insurer shall defend all suits even if groundless, it has been held that the language of the contract must first be looked to, and next the allegations of the complaint in the action against the insured, and the refusal to defend by the insurer is a breach of the contract, and the insured by such action is released from any obligation to leave the management of the suit to the insurer and is justified in proceeding to defend on his own account.

Lamb vs. Belt Casualty Co., 3 Cal. APP (2d) 624, 40 P (2d) 311.

Where the allegation of facts within a complaint are partly within and partly outside of the policy coverage, the insured has a duty to defend, and even though there be a conflict as between the allegations of the complaint and the known facts, the better view is that the courts will adhere to the rule that the allegations of the complaint are controlling.

50 ALR 2d, pp 496 and 506.
Remmer v. Glen Falls Indem. Co. (1956) (Cal. APP 2d), 295, P2d 19.

It is further stated in 50 ALR 2d at page 506, paragraph 24, as follows:

> "Where a complaint alleges facts which represent a risk outside the coverage of the policy but also avers facts, which, if proved, represent a covered risk, the insurer is under a duty to defend. Stated differently the fact that grounds of damage against the insured other than those stated in the policy, and liability against others than the insured, were pleaded, is immaterial if the injured person pleaded any grounds against the insured coming within the terms of the policy." (Citing many authorities)

The court stated in the case of Boutwell vs. Employers Liability Assur. Corp. (1949) (CA 5th Miss.) 175 F2d, 597, in speaking of the duty of the insurer under an agreement to defend:

> "Its obligation was not merely to defend in cases having perfect declarations, but in cases where by any reasonable intendment of the pleadings liability could be inferred."

Even though the action filed against insured eventually proved groundless and was defeated, it has been held that

the insurer was required to defend an action in which the cause was based on a claim for damages covered by the policy, wherein insurer agreed or undertook to defend such suit whether groundless or not, and the insurer held liable for the costs and expenses of the insured in making his own defense to said action.

Bloom-Rosenblum-Kline Co. v. Union Indem. Co., 121 Ohio ST 220, 167 N. E. 884.

Journal Publishing Co. v. General Casualty Co., 210 F2d 202.

8 Appleman, Insurance Law & Practice, paragraph 4691.

If an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person's claim, and is then entitled to reimbursement from the insurer.

8 Appleman, Insurance Law & Practice, paragraph 4690.

It would therefore appear to be the general and prevailing rule that an insurer has the duty to defend where any one of the allegations of a complaint brought against an insured are within the general insuring agreements of the policy. In the case at hand, appellant, upon the appellee's refusal to defend, proceeded to defend and settle and comromise the Buffington claim by the payment of $15,000.00, which the lower court determined to be a fair and reasonable sum in the settlement thereof, and in such defense expended the sum of $260.73 actual costs, and $750.00 attorneys fees, which the lower court also determined to be fair and reasonable sums, so that the reasonableness of the

settlement and the costs and attorneys fees is not at issue in this appeal, nor is there at issue in this appeal the right of appellant to recover attorneys fees upon the complaint brought against appellee in the event of a favorable decision to appellant, in that in the lower court it was stipulated that the court could set such fees in such event (R., pp 46, 47).

Under Oregon law, an insured has the right to recover reasonable attorneys fees from an insurer who has refused to defend an action brought against the insured where more than six months has expired from the date of the tender and no settlement is made by insurer.

Journal Publishing Co. v. General Casualty Co., 210 F2d 202. (supra).
Oregon Revised Statutes, Section 736.325.

The allegations of the complaint brought against an insured under a Public Liability Policy are the controlling factors in determining whether or not there is coverage for the insured under the policy.

The averments of negligence set forth in the first cause of action of the Buffington Complaint were such allegations as brought the action within the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured.

The general insuring agreements of the policy of insurance in question read as follows (See Page 2, Appellants' Trial Exhibit No. 3):

"INSURING AGREEMENTS

1. To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under any warranty of goods or products, or any written contract:

(a) for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained or alleged to have been sustained by any person or persons;"

The allegations of negligence set forth in the first cause of action of the Buffington Complaint are as follows: (R., pp 11, 13)

"IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained

gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly, to this plaintiff when the same was represented to her to be entirely stove oil."

Appellant makes no point as to allegation (a), but as to the remaining allegations of the Buffington Complaint stated above, appellant alleges that they are within the general insuring agreements of the policy of insurance in question, in that the acts of negligence are directed to the use of faulty equipment and/or the negligence of the truck driver and not a product of the insured or a defect in a product manufactured by the insured. In paragraph (b) and (c) the claimant alleges that the negligence was the pumping of fuel oil products from a tank truck through a single hose serving both explosive and non-explosive products and failing to properly rid the hose of a highly

explosive product before delivering a non-explosive product. Allegation (d) is directed to the negligence of the appellant in using and operating a fuel oil truck without a separate hose upon it to deliver stove oil, a non-explosive product, but using the same hose for both non-explosive and highly explosive fuels. It would seem to clearly indicate an intention on the part of the pleader that the use of the faulty equipment and/or the negligence of the truck driver was the negligence proximately contributing to the accident alleged in the Buffington Complaint. The following are cases supporting this contention:

> Employers Liability Assurance Corp., Ltd., vs. Youghiogheny & Ohio Coal Co., (United States Court of Appeals, Eighth Circuit, July 7, 1954) 214 F2d, 418.

This case involved an action by an insured coal company against its liability insurer, which had refused to defend a personal injury action brought against the insured, to recover damages alleged to be within coverage of the policy. In this case, the coal company at its premises in Superior, Wisconsin, accepted, prepared for loading, and loaded with coal a certain freight car. The car was thereafter delivered to the Great Northern Railway Company, "spotted" on a siding at Princeton, Minnesota, and an employee of the consignee of the car, one Burnett, in attempting to open one of the sliding doors of the car was severely injured when the door left its moorings and crashed down upon him. The injured party brought an action against the coal company and railroad companies involved. That among the acts of negligence alleged were the following:

> "That said coal company knew, or in the exercise of reasonable or ordinary care should have known,

that said railroad freight car was in bad order and unfit for the transportation of coal. ***

"That said coal company knew, or in the exercise of reasonable or ordinary care should have known that in the type of car furnished it by its co-defendants there is required to be erected and securely fastened a false door, so as to prevent the bulk coal from pressing against the outside sliding doors of said car.

"That said defendant coal company carelessly and negligently failed and neglected, either to install the false door or sheeting between the outside door and the bulk coal proper, or carelessly and negligently failed and neglected to properly secure said false door or sheeting so that said bulk coal would not bear its weight, in whole or in part, directly against the outside of (the) sliding door of said car."

The policy contained the usual insuring agreements of a liability policy covering the coal company's premises and operations at Superior, Wisconsin, including an agreement to defend. That among the exclusions in said policy was one defining products, which is almost identical to the one in the case at hand. The insurance carrier refused to defend after a tender of the defense, claiming that the injuries were not covered by the policy and were excluded by reason of the products clause, as well as another clause having to do with "vehicles * * * or the loading or unloading thereof, * * *." The coal company accordingly undertook its own defense, and during the course of the trial "upon advise of counsel" settled the case.

The trial court filed an opinion, and its conclusion was expressed in portions as follows:

"The question of coverage is to be determined from the allegations in the complaint against the insured.

> "With respect to defendant's contention that the products liability coverage which plaintiff could have, but had not, purchased would have granted it protection, the short answer is that if the injury to Burnett resulted from a defective freight car or in negligence in failing to discover and remedy such defect or even in the faulty preparation of the car prior to loading, as alleged by Burnett no defective condition in the products handled by the plaintiff was involved. Certainly, the freight car was not a product of the insured."

The appellant court upheld the decision of the lower court and stated as follows:

> " . . . it was not the negligent handling of the product coal, in the loading of the car in Wisconsin in this case, but the negligence of the defendant in loading and shipping the coal in a defective car.
>
> "As pointed out by the trial court, 'the allegations of Burnett's complaint with respect to the liability of this plaintiff (coal company) had nothing to do with the products of the insured . . .' We cannot say that the court erred in so holding."
>
> Philadelphia Fire and Marine Insurance Company, et al, vs. Grandview 42 Wash. 2d 357, 255 P2d, 540.

The above case involved the same insurance company as the appellee herein, and furthermore the policy was for all purposes identical even to having attached thereto an "Exclusion of Product Liability" clause identical to the one attached to the policy in the case before this court. An action was brought against the City of Grandview by one Hunt, whose home was damaged when an explosion occurred in the residence next door owned by one Russell. The basis of a judgment received by Hunt against the City of Grandview was that the water department of the

City of Grandview, by and through its superintendent, negligently and carelessly permitted a highly inflammable and explosive methane gas to be introduced, pumped into and carried through the pipes of its water system to dwellings within the City of Grandview, including the dwelling of Russell, and in negligently and carelessly directing the Russells to open their faucets and permit the gas to enter into and fill their residence when they knew, or should have known, that it would ignite, explode and cause damage. The Supreme Court affirmed the holding of the trial court and stated that the proximate cause of the accident was the negligence of the employees of the city and that the product liability exclusion endorsement did not cover the situation presented and that the negligence was within the general insuring agreements of the policy.

A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Company, plaintiffs, vs. American Casualty Company of Reading, Pennsylvania, defendant (United States District Court E. D. So. Carolina, Columbia Division, March 2, 1955) 129 F. Supp 4.

This was an action brought for a declaratory judgment that liability insurer had an obligation to defend an action in the State Court against insured and pay any judgment rendered. The court held that the allegations of the complaint and answer in the State Court action raised substantial fact issues requiring the insurer to defend. The facts of the case were that the insured had a sub-contract on a large housing project for the plumbing and heating portion of the project, which involved, among other things, the construction of underground gas lines. That as the units were completed, they were apparently occupied, and

prior to the completion of the entire project an explosion occurred in one of the apartments causing personal injuries to a person who thereafter proceeded against the insured in the State Court, as well as other contractors upon the job, the housing authority and the sureties on performance bonds given by the various contractors.

The policy involved was a comprehensive liability policy covering both personal injury and property damage, and the insuring agreements were similar to the policy involved in the present case. The policy further contained an agreement to defend suits brought against the named insured, even if they were groundless, false or fraudulent, and also by an endorsement declared that the policy did not apply to product liability, which was defined under the term "Definitions" to mean as set forth therein, which terminology is for purposes of argument here, almost identical.

The court, after considerable discussion as to the meaning of words and phrases and language used generally in insurance policies and the difficulty of interpretation thereof, stated as follows:

> "Products liability, to the average person, refers to liability arising out of the use of, or existence of any condition in goods or products manufactured, sold, handled or distributed by the insured. The suit in the State Court involved no such liability, but is based on alleged negligent construction by the plaintiff.
>
> "(8) After a careful analysis of all the relevant provisions of the policy, I must conclude that a plumbing and heating contractors comprehensive liability coverage is not covered under the heading 'Products,' and that the policy here involved should be construed to cover the liability for accidents arising from plain-

tiff's operations whether the accident happened before or after the housing project was completed.

"A careful analysis of the complaint in the State Court will show that it does not clearly and definitely allege that plaintiff's 'Operations' had been completed. The allegations of the complaint indicate a clear intention on the part of the pleader to claim that the gas installations leading into Apartment 14-E were negligently constructed. It did not matter to the plaintiff whether he was injured before or after the plaintiff's 'Operations' had been completed. It is clearly apparent from the allegations of the complaint in the State Court action that the plaintiff could have recovered by showing that the explosion occurred before plaintiff's 'Operations' on this project had been completed. This being true the Insurance Company owed a duty to the plaintiff to defend the action. Employers Mutual Liability Ins. Co. of Wisconsin vs. Hendrix, 4 Cir., 199 F. 2d 53; Lee v. Aetna Casualty & Surety Co., supra, 178 F. 2d 750; Boutwell v. Employers Liability Assurance Corp., 5 Cir., 175 F. 2d 597. To paraphrase Judge Soper's language in the Hendrix case, supra: In other words, it was obvious to the insurer upon reading the complaint that it was not essential to recovery that the claimant show that plaintiff's 'Operations' had been completed, because claimant could recover damages from defendants by merely showing that they were negligent in the construction of the project.

"In Boutwell v. Employer's Liability Assurance Corp., supra, 175 F. 2d 597, 599, the facts were quite similar to those here involved. In that case the Court of Appeals for the Fifth Circuit, after stating that the duty of the Insurance Company to defend, must be determined by the allegations in the declaration in the suit against the insured, then said: 'We also think it is quite clear that if the Appellant had fully completed the work of installation of a gas heater, and that the fire had occurred thereafter by virtue of defects in the appliances fully installed, there

would have been no liability under the policy. Nevertheless, if the allegations of the plaintiffs were to the effect that the damage was caused by the negligence of the appellant in the installation or in the failure to exercise reasonable care in installing the instrumentalities for use in transmitting and utilizing so volatile a substance as gas, there would have been an obligation under the policy upon the insurer to defend the suits and to pay the amount of the judgments, costs, and expenses in the event of recoveries under such allegations."

CONCLUSION

The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Respectfully submitted,

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APPENDIX

At the commencement of the trial in the lower court, plaintiff offered the Complaint, together with the exhibits attached, as an additional plaintiffs exhibit to the Pre-Trial Order, and all of the plaintiff's and defendant's exhibits contained within the Pre-Trial Order were offered by the respective parties and allowed and made a part of the record. Appellee offered additional exhibits, which were allowed, but none of them appear in Appellant's Designation of Record on Appeal.